**What type of interest does A have?**
**Freehold**

- **Fee simple estate (RP)**
- **Life estate**
- **Future interest estates**
    - Estate in remainder (to X for life, then to Y)
    - Estate in reversion (to X for life of Y)

**Leasehold estate**

- It is an estate (confers exclusive possession and divides interests in land over time)

**How it can be created?**

- **Registered** – complies with applicable statutory formalities for creation of legal lease
    - **unregistered lease of less than 3 years still takes effect as a LEGAL lease** : TLA s 66(1)
- **Legal lease**
    - can be created by parol, best rent which can be reasonably obtained without taking a fine; taking effect in possession, term not exceeding 3 years: PLA s 54(2)
- **Equitable lease** – agreement does not comply with formalities for creation of a legal lease (or fall into relevant statutory exception), but is nevertheless enforceable in equity (Walsh v Lonsdale; PP; EE)

**Test: two elements must be satisfied (Radaich):**

1. **Is there a certainty of maximum duration for the tenancy (Swan)?**
    a. It **must be certain or capable of being ascertained** that the exclusive possession will come to an end at the commencement, known or ascertainable **before the commencement** of the lease.
    b. Not a matter of chance
    c. Exception
        i. Periodic (yearly or period less than a year) (continues indefinitely until termination)
        ii. Tenancy at will (arrangement until terminated)
        iii. Tenancy for life
        iv. Tenancy at sufferance (happens at expiration of lease, stayed there without assent or dissent)
2. **Has the tenant been granted legal right to exclusive possession over the property?**
    a. **At the time it was granted:**
        i. Look to the **substance not the label** (Swan; King)
        ii. The **purpose and the uses** intended by the parties
        iii. The **language used** are not decisive (Swan)
    b. If document ambiguous, look at **surrounding circumstances** (Croft J in Swan)

**Factual possession (Powell)**

- Must be **singular and exclusive** (King v David Allen)
    - **King v David (N, license only)**: the agreement only established the ability to use the wall for postering without conferring the **exclusive right to do so or control**. L has some control over what can be posted.
- Signifies an appropriate **degree of physical control** (Powell)
    - **Depend on the circumstances and particularly the nature of the land** and the manner in which land of that nature is commonly used or enjoyed (Powell)
        - **Open land**: absolute physical control normally impracticable (Slade J in Powell)
    - **Radaich (Y, lease):** tenant **had the keys and controlled access**; paid for any damage to the property and for routine maintenance. **The character of the business** was such that it could **only be effectively carried on if the appellant had exclusive occupation**
        - Need **effective control** to run the business, eg who the employee, guests are while running the business
    - **Swan (Y, lease)**: the AirBnB guests would likely **need to give permission** to let Uecker in to get possession
- Measure according to an **objective standard** (Powell)

- **Powell (Yes for this stage only)**: graze his family cow on the field, used the field to park vehicles, store timber, and had put up a small fence + entered the land from time to time to go shooting and arranged clay pigeon shoots on a few occasions

**Intention to possess: to exclude the world at large (Powell)**

- Objectively assessed unequivocal **intention to exclude the true owner** (Powell).
  - **Clear and affirmative evidence** (Powell)
  - Made such intention to acquired possession clear to the world (Powell)
  - Distinction between 'mere use' and 'intention to possession'
- **Enclosure of the land** a strong indicator of the requisite intention
  - **Cf Willingness to pay/lease** disputed land is not inconsistent with intentions to possess
- Noting that it **would be expected for a landlord to keep the keys and conduct inspections** or repairs (Swan)
- **Do not need to show an intention to own (gain title)**
- **Subjective statements of intention** should be regarded with caution (Whittlesea)

**Effect of establishment**

- A property right (a **possessory right**) and a legal presumption (presumptive title)
  a. Usually **a leasehold estate in fee simple**
- **If not a lease: contractual licence**, this is a personal right that can be revoked (Cowell)
  a. not enforceable against third parties (King v David Allen)

**Covenant implied in leases: s 67 of TLA**

- **Lessee will pay rent**
- Lessee keep and yield up the property in good and tenantable repair
- Lessor may with or without workmen once in every year enter property and view the state of repair

**Relevant cases**

**'Exclusive' possession requires a tenant to have the ability to exclude others from the subject property.**

**King v David Allen (lease):** Agreement between owner of a theatre and billposting company for the company to **post advertising on a wall**. Agreement was **titled 'license'**, and **referred to the parties as 'licensor and licensee'.**

- The title of the agreement and reference to the parties was a factor in determining the intention of the parties, but it is not determinative.
- The agreement only established the ability to use the wall for postering **without conferring the exclusive right to do so or control over the entire wall**. The agreement thus could not be considered a lease and was merely a license. They were not granted a legal right to exclusive possession, the landlord **retained some right to decide** what the sign posting company put on the wall.

**The substance (actual intention, operations) of the agreement was more important than the title/form of the agreement.**

**Radaich (lease):** Premises were a 'lock up shop' – **tenant had the keys and controlled access**. Tenant **paid for any damage to the property and for routine maintenance**. Outside of business hours, the **tenant controlled who had access** to the property. The agreement titled 'license' was used to avoid tenancy regulations.

- Here, the substance indicated that it was a lease, overcoming the form. **The character of the business was such that it could only be effectively carried on if the appellant had exclusive occupation** …even at times when they could not lawfully be kept open for the purposes of the business, the premises were to **remain under her effective control** (Taylor J)
- The business could only be carried out in 'reasonable convenience' by having exclusive possession (per McTiernan J)
- It is **about intention**; what did they actually agree? (per Windeyer J)

**Swan (lease)**: Renters got a lease over a property. During the tenancy, the Renters put the property up on Airbnb. The Landlord served a notice to vacate because the original lease required the Renters to obtain permission from the Landlord prior to subletting. No consent had been obtained. Swan brought action on the basis that Uecker sublet in breach of provisions of the initial lease agreement

- The listing said "I am leaving to allow you to have it all to yourself". **The AirBnB guests would likely need to give permission to let Uecker in to get possession** etc. The fact that Uecker **retained their keys did not negate exclusive possession**
- The Airbnb agreement was a lease. The Renters were subleasing the property to customers on Airbnb. When the Airbnb agreement was on foot, the renters transferred their exclusive possession to the Airbnb tenants. The Airbnb agreement also had a certainty of maximum duration.
    - 'The reference in that agreement to **"licence" is no more than a label** (Croft J)

## Characteristic of property interest: Co-ownership (Not itself a category)

- Co ownership describes the entitlement to stimulations possession which entitles each owner to enjoy each and every part of the land at the same time
    - both parties entitled concurrently to possession of the whole of the land, and
    - right to possession does not include a right to exclude other co-owners

### Joint tenants

- Both parties own 100% of the property interests together (no physical division)
- Each tenant entitled to use, enjoyment and possession of whole land
    - a corporation may be a joint tenant: s 28 PLA
- Can sell their share

### Test for Joint Tenancy: the four unities

1. **Unity of possession**
    a. Each tenant is entitled to possession of all the property and a joint tenant cannot exclude other co-owners
    b. Parties can reach contractual agreement about use and occupation without destroying unity of possession
2. **Unity of interest**
    a. Each tenant's interest must be the same **in nature, extent and duration**
        i. Nature - if to A and heirs in fee simple and to B for life, there is no unity of interest
        ii. Extent - a holds 40% and B holds 60%, no unity because of unequal shares
        iii. Duration – A tenant for life cannot be joint tenant with tenants for 20 years
3. **Unity of time**
    a. Interest vests at the same time and by virtue of the same instrument
        i. Eg **separate instruments** used will break unity of time
        ii. Eg vesting when A+B each reach 21, however there are different ages means that they will become tenants in common
4. **Unity of title**
    a. Interest created in same title, document or act of adverse possession

### Right of survivorship applies

- If one dies, the surviving joint tenant remains entitled to whole estate, they are no longer subject to the interests of the deceased parties
    - Order of death: when joint tenants are seen to die at the same time, death is presumed to have occurred in order of seniority (oldest dies first)
    - **Torrens**: a surviving joint tenant is entitled to be registered as the sole RP on proof of death of the diseased joint proprietor: s 50 TLA
    - Cannot be disposed by will: the deceased co-owners interest cannot pass in his or her will under an intestacy

### Tenants in common

- Each owns a distinct share in the property which can be equal or unequal. Any indication that parties hold an equal portion is tenants in common.
- **Unity of Possession (must be present)**
    - Each tenant is entitled to possession of all the property and a joint tenant is not entitled to exclude the other co-owners
    - The parties can reach contractual agreement about use and occupation without destroying unity of possession
- **Other 3 elements may be presented too**

- Interest may be disposed by will so when one dies, their share passes on to heir (right of survivorship does not applied)

**Creating a co-owned proprietary interest**

**Torrens Land (Presumption of joint tenancy)**: s 33(4) TLA

- TLA provides that **co-owners shall be deemed to be joint tenants** where two or more persons are entitled as tenants in common to undivided shares of or in any land (as a starting point), but the Registrar may create a single folio for the entirety or separate folios for each of the individual shares
    - **may record them in the register as tenants in common: s 30(2)**

**At CL (presumption of joint tenancy)**

- A weak presumption, easily rebutted by evidence of either one of four unities was absent, but not unity of possession
    - Use of **words of Severance** were used in the instrument creating the interest. Words which to show that tenants were to take a distinct and individual share in the property

**In Equity (presumption of tenants in common)**

- Equity prefers the certainty and equality of the tenancy in common where parties are presumed to have intended to retain individual separate shares (can be rebutted)
    - Purchasers who **contributed in unequal proportions** to the purchase price (eg a resulting or constructive trust)
    - (e.g. business partners, two or more advance money on a mortgage, two or more contribute unequally to a purchase price)
- **Husband and wife relationship** is usually rebutted (Cummins): the court will readily find an intention to hold as **joint tenants** despite unequal contributions
- **Business relationship**: **equity will presume a resulting trust** i.e. in equity, legal joint tenants hold each other's equitable share as tenants in common on trust for each other
    - Even under an informal relationship, if the purpose is for profit the presumption of applies